



OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS
JOHN CORNYN

March 27, 2000

Mr. Duncan Fox
Assistant Chief
Legal Services
Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2000-1184

Dear Mr. Fox:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133357.

The Texas Department of Public Safety (the "department") received a request for information pertaining to a fatal motor vehicle accident that involved a vehicle driven by a department trooper. Specifically, the requestor has asked for: 1) the accident report; 2) the police report; 3) copies of any witness statements; 4) scene photographs; and 5) a copy of the video surveillance tape taken from the Diamond Shamrock located near the scene of the accident. You claim that the requested information, except for the accident report, is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of the responsive information.²

Initially, we note that the submitted videotape appears to be the subject of Open Records Letter No. 2000-0285 (2000). A governmental body is not required to seek a determination

¹We assume that the department has released the accident report to the requestor.

²The submitted representative sample consists of a videotape and several scene photographs. In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

from this office regarding the disclosure of information if the governmental body has previously requested and received a determination from this office concerning precisely the same information. Gov't Code § 552.301(a). If the submitted videotape, or any other requested information, is identical to information this office previously found to be excepted from required disclosure in Open Records Letter No. 2000-0285 (2000), it remains excepted from required disclosure and may be withheld, provided that there have been no substantive changes in circumstances or law that would require us to reexamine the information. *See* Open Records No. 638 at 3-4 (1996) (discussing change of circumstances in regard to pending or anticipated litigation).

In regard to the submitted photographs, witness statements, and videotape to the extent they differ from the information at issue in Open Records Letter No. 2000-0285 (2000), we address your argument concerning section 552.103. Section 552.103(a) excepts from required public disclosure information

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party[.]

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, (Tex. App.-- Austin 1997, no pet.); Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

Here, you have submitted a copy of a notice of claim sent to the department by an attorney for the family of the person killed in the accident. The notice of claim alleges, *inter alia*, that an officer of the department caused the fatality. You represent that the notice was filed pursuant to the Texas Tort Claims Act. Open Records Decision No. 638 (1996) concluded that a governmental body could show that litigation is reasonably anticipated if it has received a claim letter and also represents to this office that the letter is in compliance with the notice requirements of the Texas Tort Claims Act. Accordingly, we conclude that you have shown that litigation to which the requested information relates is reasonably anticipated.

Therefore, except as noted below, you may withhold the information responsive to the request under section 552.103(a).

Please note that, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing parties have seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "E. Joanna Fitzgerald".

E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\nc

Ref: ID# 133357

Encl: Submitted documents

cc: Joe Olivarez, Jr.
Swalles, Sheridan, Slade & Assocs.
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(w/o enclosures)